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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Honorable JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on September 7, 1962.

OPINION BELOW

The second Opinion of the Court of Appeals is not yet reported. That Opinion is Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals on rehearing was entered September 7, 1962 (Appendix A), infra, p. 10a, vacating the Court's denial of a writ of mandamus entered June 27, 1962, and entering a writ of mandamus compelling the transfer of an action under the Federal Employers' Liability Act to the United States District Court, Grand Rapids, Michigan. A Petition for Rehearing on the judgment of September 7, 1962 was denied by the Court of Appeals on October 4, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether full faith and credit requires a district court on a motion to transfer under 28 U. S. C. 1404 (a) to transfer an action brought under the Federal Employers' Liability Act that had previously been dismissed by a state court in the same district.

STATUTES INVOLVED

Section 1404 (a) of the Judicial Code of 1948, 62 Stat. 937, 28 U. S. C. 1404 (a), Section 1738 of the Judicial Code of 1948, 62 Stat. 947, 28 U. S. C. 1738, and Section 6 of the Federal Employers' Liability Act as Amended, 35 Stat. 66, 45 U. S. C. 56 are set forth in Appendix B hereto.

STATEMENT

This case arises out of a cause of action brought on behalf of a plaintiff who was, and is, a resident of Ludington, Michigan. The case involves only the question of the ruling of the United States District Court in denying a motion to transfer that cause of action to Grand Rapids, Michigan on the motion of the respondent brought under the provisions of 28 U. S. C. 1404 (a). The Court of Appeals in its second Opinion issued a writ of mandamus compelling the transfer sought by respondent.

The underlying cause of action grew out of facts in which the plaintiff was injured while employed by the railroad in its East Yard in Ludington on July 15, 1960. He was operating a hand brake on a box car when it suddenly released and threw him to the ground. He was hospitalized for 2 weeks and was treated by Dr. Sutter, the company doctor. He then remained at home for 2 more weeks before he was ordered back to work by Dr. Sutter. Plaintiff worked off and on with considerable pain. Plaintiff saw two chiropractors of his own choosing in this period and also saw Dr. Boelkens who did not give him any treatment (Record 84).

Plaintiff requested the railroad to refer him to a specialist. His request was not granted but Respondent's claim agent attempted to settle the case on the basis that the medical reports showed that there was nothing wrong with him. Plaintiff refused to settle because he needed more medical attention. Because he did not know of any specialist in his area, he sought out his counsel for legal help and for medical help (Record 84).

Plaintiff's attorney referred him to an orthopedic specialist, Dr. G. J. Rabin of Chicago. After examination, Dr.

Rabin found the plaintiff had a serious injury to the neck and lower back and recommended that he be hospitalized for conservative treatment. Plaintiff was admitted to Alexian Brothers Hospital in Chicago on January 17, 1961. At that time he had acute pain in the neck with radiating pain and symptomatology down the left upper extremity with acute pain in the low back radiating down the lower extremities. While in the hospital plaintiff was placed in cervical and pelvic traction and was given an intensive course in physiotherapy and anti-spasmodic medication. Plaintiff was discharged on February 3, 1961. On February 17, 1961, Plaintiff was readmitted to Alexian Brothers Hospital where a myelographic study performed revealed a ruptured intervertebral defect. On February 23 a laminectomy and spinal fusion was performed by Dr. Rabin who removed a large ruptured intervertebral disc between L-5 and S-1 which was causing compression of the spinal cord. The Plaintiff was fitted with a torso spica cast and he was discharged from the hospital on March 3, 1961 (Record 62).

Preceding the instant suit in the District Court, plaintiff filed an action in the Circuit Court of Cook County. That Court dismissed the action on the ground that it " was an inconvenient and inappropriate forum" (Record 30).

Plaintiff then filed the action involved herein in the District Court at Chicago on July 11, 1961. On August 23, the Respondent filed its Motion To Transfer under 28 U. S. C. 1404 (a). Its affidavit in support thereof was sworn to by its District Claim Agent. Robert Bourgette and Carl R. Johnson were fellow employees who saw the plaintiff fall from the box car. Bourgette also inspected the hand brake which the Plaintiff was releasing and found it in good working order. Fellow employee Geil did not witness the accident or inspect the hand brake. He did see the plaintiff lying on the ground until he was placed in an ambu-

lance. Vanderveer and Hayes inspected the equipment on the box car on the day following the plaintiff's injury. Ginson would not be called by Respondent and he did not witness the Plaintiff's injury (Record 53-57). All of these employee witnesses would testify in Chicago if compensated for time lost and expenses.

In his Counter-Affidavit, Plaintiff offered to produce all occurrence witnesses at the trial at Plaintiff's expense (Record 63).

The affidavit filed by Respondent also stated that testimony of seven physicians or chiropractors was necessary for its defense. Dr. Sutter, the company doctor previously mentioned, would testify that he released the plaintiff for work on August 31, 1960 and that plaintiff suffered a bruising and strain of his back muscles. Dr. Carney would testify that he treated the Plaintiff for a kidney infection in August and September of 1960. Dr. Garnau that he performed an x-ray examination of the Plaintiff's abdomonen on September 20, 1960 at Dr. Carney's request. The kidneys were normal and no kidney stones were found (Record 58, 60).

Dr. Iverson, a chiropractor, saw the plaintiff in September, October and November of 1960. He would testify that he could find nothing specific except some muscular tension. Dr. Boelkens would testify that he saw the Plaintiff on October 18 and November 12, 1960 and would testify that he found no signs of any injury. Dr. Moore, a radiologist, examined x-rays of the Plaintiff's cervical and dorsal spine at the request of Dr. Boelkens. He found no evidence of injury (Record 57-59).

The Plaintiff's Affidavit states that he was sent to Dr. Boelkens by the company and that Dr. Boelkens told the plaintiff that if he continued to have trouble he would be

referred to an orthopedic surgeon or a neurologist. When the plaintiff requested a specialist, Dr. Boelkens wrote him that his request had been referred to the claim department. (Record 84). As previously stated, Plaintiff's request to see a specialist was never granted.

The last of these seven witnesses to see the plaintiff was E. T. Kruse, a chiropractor, in November and December 1960. He found a lumbo sacral strain which responded satisfactorily and appeared corrected. (Record 59). The railroad stated that each of these seven witnesses would be unable to leave his practice for the time required to testify in Chicago but that each would be willing to testify in Grand Rapids, Michigan.

Following this last medical examination in Michigan, Plaintiff was twice hospitalized in Chicago, Illinos for periods of 17 and of 14 days. During the second period, a positive myelogram was found and a laminectomy and spinal fusion was performed by Dr. Rabin. Plaintiff stated that Dr. Rabin was required as a witness and that it would cost the plaintiff a minimum of $1,000.00 for Dr. Rabin's presence in Michigan, and that Dr. Rabin's testimony could be presented in Chicago without causing him to forego any of the surgery customarily performed by him 5 or 6 days per week. Plaintiff also stated that a controversy as to the condition of the plaintiff would require him to produce the roentgenologist, the assisting surgeon, nurses, anesthetist and therapist at Alexian Brothers Hospital. It was also stated that Plaintiff's medical expenses in Chicago were then $1,425.00 and that his hospital bill was in the amount of $1,066.00 and that plaintiff remained under the care and treatment of Dr. Rabin (Record 63).

The railroad's Motion To Transfer was denied on December 7, 1961 with Petitioner given 30 days to Answer or other-

wise move. On January 10, 1962, Petitioner filed its Answer which stated that it was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that the hand brake suddenly and violently released while he was attempting to release causing him to fall from the car (Record 81, 43).

On February 9, 1962, Petitioner was granted a re-hearing on its Petition. Oral argument was heard and briefs were submitted on the re-hearing. The Motion To Transfer, on re-hearing, was again denied on March 20, 1962.

On such facts, the Court of Appeals first handed down an Opinion denying the writ of mandamus sought by the railroad. On re-hearing, that Court set aside its previous Opinion and Orders and issued the writ of mandamus based on its conclusion that Petitioner was without discretion but was required to recognize the decision of the Circuit Court of Cook County and was, therefore, required to transfer the case to the United States District Court at Grand Rapids, Michigan. In accordance with this Opinion, the Court of Appeals issued a writ of mandamus compelling this Petitioner to transfer the cause. This Petition seeks a review only of the Opinion and Order divesting Petitioner of all discretion and of any power to consider the Motion To Transfer in accordance with the provisions of 28 U. S. C. § 1404 (a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal jurisdiction and federal practice which have not been, but should be, settled by this Court.

A. The Court of Appeals in a novel decision for the first time in federal jurisprudence has decided that a fed-

eral court is required to give full faith and credit to the discretionary act of a state court.

B. The holding that the district court had no discretion to consider the standards set out in 28 U. S. C. § 1404 (a) because other state courts in Cook County would have dismissed on the basis of the Circuit Court's dismissal wrongly and erroneously deprives the federal courts of jurisdiction granted by Congress.

C. The Opinion of the Court of Appeals is in direct conflict with this court's decision in *Angel* v. *Bullington*, 330 U. S. 183, holding that a plaintiff is not barred when some of the Courts of the state are closed to him.

D. The decision grants mandamus despite the conflict of the circuits as to the power to issue such writ and despite the express reservation of that question in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33, not to correct an abuse of discretion in applying 28 U. S. C. § 1404 (a) but to obliterate all discretion in a case arising under a federal statute because a state court had dismissed the same action in the exercise of the discretion granted it under the applicable state law.

E. The decision wrongfully and erroneously deprives the plaintiff of his federal rights by establishing a non-existent doctrine of exhaustion of judicial remedies which would compel the plaintiff to appeal the discretionary order of the state court or forfeit his federal right to a choice of forum.

F. The decision wrongfully and erroneously attempts to rely on a misapplication of the doctrine of estoppel by verdict to bind the plaintiff and to support the holding that the federal court was stripped of all discretion and of all judicial power and relegated to a clerical status.

ARGUMENT

The cause of action underlying this Petition had previously been dismissed by the Circuit Court of Cook County on its finding that it "was an inconvenient and inappropriate forum". The same cause of action was then filed in the United States District Court in Chicago, Illinois. The decision below compels the Petitioner to transfer the cause of action to the District Court at Grand Rapids, Michigan. In such decision, the Court of Appeals stripped Petitioner of all discretion, deprived Petitioner of the power to consider the standards of 28 U. S. C. § 1404 (a), and relegated the federal court's jurisdiction to a position inferior to that of the Circuit Court of Cook County. The compulsions of full faith and credit were held to require this result.

The case at bar is the first to hold that full faith and credit requires that a federal court be divested of all discretion because another court has exercised discretion when the same cause was pending before it. By accenting some similarities, the Court of Appeals has ignored the differing material factual issues so capably summarized in the Dissenting Opinion.

The novelty of this decision is manifest in its holding that the discretion of a state judge in dismissing a cause of action from a county court obliterates the discretion of a federal court granted under federal statute. The only case cited for this astounding result is *Wayside Transp. Co.* v. *Mercell's Motor Express, Inc.*, 284 F. 2d 868, 870. A careful consideration of that case establishes that the plaintiff therein had by counsel previously challenged the jurisdiction of a Vermont Court. The Vermont Court having decided that it had jurisdiction certified the case to the Supreme Court of Vermont before trial. Plaintiff's attorney

refused to appear further in the case and did not appeal. Following various settings for pretrial conferences, the Vermont Court entered a default judgment against the non-appearing party. Subsequently the defendant in the Vermont action filed suit on the same cause of action in the Federal Court in Massachusetts. The default judgment was pleaded in a counterclaim and the District Court granted summary judgment in the main case for the defendant, and entered judgment on defendant's counterclaim. It is in these circumstances that the Court of Appeals wrote the Opinion relied on by the court below. The Court of Appeals, of course, affirmed the judgment since it is well established law that a person or party who contests jurisdiction and loses on that issue must appeal. As the Court of Appeals there points out, there was no necessity to appear in the Vermont action since the question of jurisdiction was open to litigation in a suit on any judgment obtained in any Court in which that judgment was attempted to be enforced. A mere recitation of the facts in the case cited by the Court of Appeals shows that it is in no way applicable to the present factual situation. That case is based solely on the doctrine of *res judicata*. It is true that full faith and credit implements that doctrine in the case, but the case would be decided in the same manner absent any application of full faith and credit.

However, the doctrine of res judicata applies only to a final judgment of the merits. The instant case, on the other hand, is admittedly a mere judgment of dismissal and the plaintiff was free to exercise his choice of forum since the decision of the Circuit Court did not purport to bar his cause of action. The Court of Appeals erroneously infers some measure of finality in its statement that other state courts in Cook County would have dismissed on the basis of the Circuit Court's dismissal. Even if true, such fact is

irrelevant and wrongfully and erroneously divests the federal court of jurisdiction granted by Congress for the express purpose of extending the jurisdiction of the federal courts beyond the territorial limits of the county in which the federal court sits. Moreover, the Opinion of the Court of Appeals in imposing and inferring such finality directly conflicts with the Opinion of this Court in *Angel* v. *Bullington*, 330 U. S. 183, which squarely holds that a plaintiff is not barred from litigating in the federal courts unless, and until, it has been finally decided that all of the courts of the state in which he brought his preceding litigation are closed to him. This Court there states the converse of the Court of Appeals proposition and holds that a plaintiff is not barred when only some of the courts of the state are closed to him.

The basic error in the holding of the Court of Appeals is seen when a hypothetical case is considered. Assuming that the same injury was sustained by the plaintiff in an occurrence in East Chicago, Indiana, it is plain that the removal of any discretion from the District Court would require the court to transfer the suit to a federal court in Indiana. This would be true even though the place of the accident would be well within the 100 miles within which a federal court may issue a subpoena for trial under the provisions of Rule 45 (e) (1) of the Federal Rules of Civil Procedure.

Despite the differences in the material factual issues and in the territorial jurisdictions of the courts here involved, the writ of mandamus was issued in perpetuation of the present conflict between the circuits as to whether such a writ lies, and despite the express reservation of that question in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. Moreover, the Court of Appeals issued the writ not to correct an abuse of discretion in applying the principles as stated in 28 U. S. C. § 1404 (a), but to order the cause transferred

without any consideration of the principles raised by the Motion To Transfer filed by the railroad. This is done despite the clear intent of Congress to invest the District Court with a broad discretion on motions to transfer and, specifically, to decide questions relating to the convenience of the party, the convenience of the witnesses, and the interest of justice. This Congressional intention is confirmed by this Court in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. The discretion vested in the District Court, moreover, is much broader than the applicable law binding the Circuit Court of Cook County. The state law is stated in *Cotton* v. *L. & N. Railroad Company*, 14 Ill. 2d 144, 152 N. E. 2d 385 where the Supreme Court of Illinois held that the issue of the motivation of the plaintiff is the only issue for determination on a Motion to Dismiss on the ground of *forum non conveniens*. The Illinois Supreme Court held that only where an FELA plaintiff is motivated purely by vexation and harassment may an Illinois state court dismiss his action on such a basis. Thus the Circuit Court was required to base its determination on its finding as to the state of mind of the plaintiff in filing his law suit but instead based its determination on its sole finding that it "was an inconvenient and inappropriate forum". The governing principles are therefore seen to be so diverse that no basis whatsoever is provided for the holding of the Court of Appeals.

The Opinion of the Court of Appeals relies on the fact that the plaintiff took no appeal in the dismissal of his cause of action in the state court. In so doing, the decision wrongfully and erroneously establishes a non-existent doctrine of the exhaustion of judicial remedies which would compel plaintiffs to appeal discretionary orders of state courts or suffer the peril of being barred from enforcing

the right to a choice of forum granted FELA plaintiffs in Section 6 of the Federal Employers' Liability Act because of the misapplication and expansion of full faith and credit by the court below.

The court below also relied on the doctrine of estoppel by verdict to buttress its conclusion that full faith and credit barred all consideration of the standards of 28 U. S. C. § 1404 (a). Such reliance was a misapplication because the order of the Circuit Court did not constitute a final judgment but, instead, was a mere dismissal and because any estoppel by verdict is squarely limited to the question actually determined by the original action, not to what might have been litigated and determined *Cromwell* v. *Sac County*, 94 U. S. 351. The specific finding that the Circuit Court "was an inconvenient and inappropriate forum" does not exhaust the standards contained in the federal Motion To Transfer.

Plaintiff here asserts a federal right which is governed by the Opinions of the federal courts. In the case below, the plaintiff sought only such a determination which was granted by Petitioner. The effect of the Opinion of the Court of Appeals is to take these matters out of the hands of the federal courts and to require a federal court, sitting in a federal action, to sit as a federal court does in an action brought in its court by virtue of diversity of citizenship. As to such cases, there are many qualifications to the general rule that a federal court sitting in diversity sits as another state court. Until the Opinion below, there was no qualification to the general rule that a federal court sitting in an action brought under federal law was governed solely by federal and not by state law.

CONCLUSION

For the reasons adverted to above and because of the demands of the law and substantial justice, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 13701 SEPTEMBER TERM, 1962, SEPTEMBER SESSION, 1962

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia Corporation, *Petitioner,* vs. THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent.*	Original Petition for Writ of Mandamus.

OPINION ON REHEARING
September 7, 1962

Before SCHNACKENBERG, CASTLE and MAJOR, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On June 27, 1962 we filed an opinion and entered an order denying the petition of The Chesapeake & Ohio Railway Company, a Virginia corporation, praying for a writ of mandamus to compel the Honorable James B. Parsons, Judge of the United States

District Court for the Northern District of Illinois, Eastern Division, named as respondent, to transfer, pursuant to the provisions of 28 U. S. C. A. § 1404(a),[1] a cause entitled *Jack J. Filbrun*[2] v. *The Chesapeake & Ohio Railway Company*, Civil No. 61 C 1174, from that court to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan.

Upon petition for rehearing, we have ordered said opinion withdrawn and all orders entered pursuant thereto vacated and set aside.

A rule having been issued directing the respondent to show cause why a writ should not issue, the matter is now before us for consideration on the petition for a writ of mandamus, the respondent's answer thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties, as well as the petition for rehearing and respondent's answer thereto, from all of which the following controlling facts appear:

> Filbrun's action against the petitioner railroad is a Federal Employers' Liability Act action for injuries alleged to have been received in a fall from a box car caused by a sudden release of a handbrake he was operating. Prior to its commencement in the District Court a substantially identical action filed by Filbrun against the petitioner in the Circuit Court of Cook County, Illinois was dismissed on the railroad's motion on the ground that the Circuit Court of Cook County "is an inconvenient and inappropriate forum". Fil-

1. 28 U. S. C. A. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. Filbrun is also referred to herein as "plaintiff".

brun did not appeal that determination. Instead he filed the United States District Court action and petitioner's motion for its transfer to the Western District of Michigan, Southern Division, pursuant to 28 U. S. C. A. § 1404(a) was denied by respondent.

Plaintiff selected the Circuit Court of Cook County, Illinois, in which to first file his personal injury suit against petitioner railroad, based on alleged injuries sustained by him at Ludington, Mason County, Michigan, which is about 60 miles from Grand Rapids, where a United States District Court sits. Respondent is a judge of the United States District Court which sits in Chicago, in Cook County, Illinois.

The jurisdiction of the district courts in federal employers' liability cases is concurrent with that of the state courts. 45 U. S. C. A. § 56.

On motion of defendant (petitioner here), the state court dismissed plaintiff's action on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum. It also denied plaintiff's motion for reconsideration of its action. Plaintiff took no appeal from either order. Instead, plaintiff's suit on the same cause of action was filed in the same city and county of Illinois but in the United States District Court.

The dismissal in the Illinois state court was based upon the doctrine of *forum non conveniens*. Respondent was required by 28 U. S. C. A. § 1738 to give full faith and credit to the order entered by the state court. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870. This is especially true because it is a court of concurrent jurisdiction in administering the Federal Employers' Liability Act, as provided in that act, *supra*. Cer-

tainly if plaintiff had refiled his action in any state court in Cook County, it would have been dismissed on the basis of the Circuit Court's dismissal.

In applying the doctrine of *forum non conveniens,* the state court, pursuant to Illinois law, applied all of the tests set forth in 28 U. S. C. A. § 1404(a), which are (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. In applying that doctrine the state court was required additionally to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the petitioner. *Cotton* v. *L. & N. R. R. Co.*, 14 Ill. 2d 144, 166, 152 N. E. 2d 385, 396. While it made that additional finding, that fact is immaterial here because the district court did not have to wrestle with that question. Plaintiff was, however, bound by the doctrine of estoppel by verdict,[3] because, on all of the other tests applied by the state court, its decision was adverse to plaintiff. These matters were again raised before the district court under § 1404(a). Confronted by a final decision thereon by a court of concurrent jurisdiction, the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff.

These reasons are sufficient upon which to grant the issuance of the writ requested. The transfer of this case to the federal district court 60 miles from plaintiff's home and the scene of his accident, and where many of the wit-

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3. In *Stangle* v. *Chicago, Rock Island and Pacific R. R. Co.*, 295 F. 2d 789, 791, we referred to a statement in regard to "estoppel by verdict" as announced in *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N. E. 2d 281, 285, as follows:

> "* * * 'estoppel by verdict or judgment, is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*' * * *".

nesses are available to both litigants, all combine to establish that justice would there be accomplished.

The writ of mandamus will issue as prayed.

MANDAMUS GRANTED.

No. 13701.

CASTLE, *Circuit Judge*, dissenting.

I would deny the petition for mandamus. In my view of the matter the contested issues presented for determination are:

(1) Whether the state court's determination, made under the *forum non conveniens* doctrine, estops Filbrun from maintaining his action in a court sitting in Cook County, Illinois, and requires the District Court to allow the petitioner's motion to transfer the action to the Western District of Michigan, Southern Division; and if it does not,

(2) Whether, on the facts and circumstances presented, it is clearly established that the respondent's denial of the transfer sought constitutes an abuse of discretion.

The state court's determination was an application of the *forum non conveniens doctrine*. This required consideration of the same relevant factors as those to be considered in applying § 1404(a) (*Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32) plus an additional and more stringent factor required by the Illinois decision governing the doctrine's application to F. E. L. A. cases (*Cotton* v. *Louisville and Nashville Railroad Company*, 14 Ill. 2d 144, 174, 152 N. E. 2d 385) that "only where it is shown that plaintiff is motivated purely by vexation and harassment will an F. E. L. A. case be dismissed" thereunder. Petitioner urges that be-

cause the state court's determination required consideration of all factors relevant to an application of § 1404(a) every point and question necessary to be passed upon in connection with its motion to transfer has already been adjudicated adversely to Filbrun. From this premise petitioner argues that Filbrun is estopped from relitigating those matters and that the full faith and credit provisions of 28 U. S. C. A. § 1738 require respondent to allow petitioner's motion to transfer.

The flaw in petitioner's contentions is that although the factors relevant to consideration of a motion to transfer under § 1404(a)—matters bearing on the convenience of the parties and witnesses, and the interest of justice—are all also relevant areas of inquiry, consideration of which is pertinent and necessary to a determination of the applicability of the *forum non conveniens* doctrine, those factors do not in the instant case involve identical material factual issues. Petitioner's contentions on this phase of the case confuse the ultimate conclusion and determination of the state court that it "is an inconvenient and inappropriate forum" with the material factual issues involved in that determination. A factual issue in the state court proceeding was whether the availability of a state forum at Ludington, Michigan (the county seat of Mason County) where the incident occurred, and where Filbrun and most of the witnesses resided,[1] as well as the availability of a federal forum

1. Subsequent to the fall, and his treatment and discharge by Ludington medical practitioners, Filbrun was hospitalized in Chicago where a laminectomy and spinal fusion was performed by a Chicago doctor to remedy a ruptured intervertebral disc. This Chicago orthopedic specialist would be Filbrun's chief medical witness. In addition, the medical and hospital records concerning the hospitalization, diagnosis, treatment and surgery are all located at Chicago as well as the roentgenologist and hospital staff who participated therein. Petitioner's occurrence witnesses are its own employees.

at Grand Rapids, Michigan, within some sixty miles of Ludington, when considered in the light of all other pertinent factors established that Filbrun's selection of the Circuit Court of Cook County at Chicago, Illinois, some three hundred miles from Ludington, was dictated purely by a desire to vex and harass the petitioner. But in resolving the issues involved in the motion to transfer the District Court action to the District Court at Grand Rapids the availability of a state forum at Ludington was not a factor which the respondent could consider. He could transfer the cause to a federal district court only—and the issues before him involved only the comparative convenience or inconvenience, and interest of justice, as measured by a choice between the District Court at Chicago, Illinois, and the District Court at Grand Rapids, Michigan. Thus, at least one material factual consideration was not identical in both proceedings.

The cases relied upon by the petitioner are therefore inapposite. In *Healea* v. *Verne*, 343 Ill. 325, 175 N. E. 562; *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 103 N. E. 227 and *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N. E. 2d 355, the estoppel recognized and applied, and in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1 Cir., 284 F. 2d 868, the application of the mandate of 28 U. S. C. A. § 1738, was grounded on an attempt to relitigate the same material fact or issue which had been the subject of a prior adjudication in an action or proceeding involving the parties.[2]

In the instant case the prior adjudication involved and required consideration of a material fact—the availability of a state court forum at Ludington—which was not sub-

2. See also *Stangle* v. *Chicago, Rock Island and Pacific Railroad Company*, 7 Cir., 295 F. 2d 789, in which this Court approved an application of the doctrine of collateral estoppel.

ject to consideration in the subsequent proceeding. The test is not whether the same relevant factors or standards were applied in the determination of an issue but whether the same fact or question was determined. The question of the comparative convenience or appropriateness of the Ludington forum over a Chicago forum is not the same as the question of such relationship between a Grand Rapids forum[3] and a Chicago forum. In my opinion the determination of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U. S. C. A. § 56), nor circumscribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion in the application of § 1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasize that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir. 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

I have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail I deem it sufficient to ob-

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3. Except that petitioner is suable there, Grand Rapids has no connection with the action.

serve that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether this Court would have reached the same conclusion is not important. In my opinion we cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner, supra* (p. 199), that:

> "Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion."

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Friday, September 7, 1962

Before Hon. Elmer J. Schnackenberg, *Circuit Judge*, Hon. Latham Castle, *Circuit Judge*, Hon. J. Earl Major, *Circuit Judge*.

The Chesapeake & Ohio Railway Company, a Virginia Corporation, *Petitioner* vs. No. 13701 The Honorable James B. Parsons Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent.*	Original Petition for Writ of Mandamus.

This matter comes before the Court on the petition of The Chesapeake & Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties; as well as the petition for rehearing, and respondent's answer thereto. It is therefore ordered that said petition for rehearing be granted.

On consideration whereof, it is ordered and adjudged by this Court that the opinion of this Court filed on June 27,

1962, and all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that a writ of mandamus issue directing Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to transfer, pursuant to the provisions of 28 U. S. C. A. § 1404(a), the cause entitled *Jack J. Filbrun* v. *The Chesapeake & Ohio Railway Company,* Civil No. 61 C 1174, from that Court to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan.

A True Copy.

Teste:

KENNETH J. CARRICK,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Section 1404(a) of the Judicial Code of 1948, 62 Stat. 937, 28 U. S. C. 1404(a), provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1738 of the Judicial Code of 1948, 62 Stat. 947, 28 U. S. C. 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 6 of the Federal Employers' Liability Act As Amended, 35 Stat. 66, 45 U. S. C. 56, provides:

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.